SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966 7

ANTHONY M. GROSSO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the district court denying a motion to dismiss the indictment (R. 26-28) is reported at 225 F. Supp. 161, 174. The opinion of the court of appeals (R. 113-128) is reported at 358 F.2d 154.

JURISDICTION

The judgment of the court of appeals (R. 129) was entered on March 25, 1966. A timely petition for rehearing was denied on May 3, 1966 (R. 130). The petition for a writ of certiorari was filed on May 28, 1966, and was granted on October 10, 1966. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the excise tax on wagering imposed by 26 U.S.C. § 4401 violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment?

2. Can a criminal conviction stand where there were communications between the court and the jury during the jury deliberations in the absence of petitioner and his counsel and there has been no showing that these communications were not prejudicial to the petitioner?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are printed in the Appendix, at p. 40 below.

STATEMENT OF CASE

Petitioner and three others were charged in a 26 count indictment with various violations of the wagering tax statutes and with conspiracy to defraud the government with regard to wagering taxes (R. 12-25). Petitioner's codefendants moved for a severance and this motion was granted (R. 6). Petitioner then went to trial on the 23 counts in which he was named. One count was dismissed by the court and another withdrawn (R. 7), and the jury found petitioner not guilty on one count (R. 62). He was found guilty on 15 counts involving failure to pay the excise tax on wagers required by 26 U.S.C. § 4401, on four counts of failure to pay the occupational tax on wagering required by 26 U.S.C. § 4411, and on one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371. He was fined $191,000 — $1,000 on the conspiracy count and $10,000 on each of the wagering tax counts — and sentenced to one year in jail on each count, with the sentence on nine of the counts to be consecutive, and the sentences on the remaining counts concurrent with one of these nine (R. 8-10). His motion to dismiss the excise tax conspiracy counts of the indictment on the ground that payment in the required manner of the wagering excise tax called for by 26 U.S.C. § 4401 would violate his privilege against self-incrimination (R. 25) was denied (R. 26-28). This constitutional objection was preserved at the trial (R. 29-36) and raised again by motions for judgment of acquittal at the close of the government's evidence (R. 36-39), at the close of all the testimony (Tr. 2219),* and after verdict (R. 75-77).

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*By stipulation of counsel in this Court, either party may refer in his brief and oral argument to any part of the original record not designated for printing.

The issues in this case were submitted to the jury at 4:15 p.m. on Wednesday, March 4, 1964 (R. 84). The jury deliberated until about 11:00 p.m. and resumed deliberation the following morning (R. 84). At 12:15 that afternoon counsel for petitioner was informed by the United States Attorney that at approximately 11:30 a.m. the jury had sent a note to the judge indicating that they could not agree, and the court had instructed the jury, through the bailiff, to continue deliberating (R. 84). Neither petitioner nor his lawyer were present when the note was received and the instruction given, and neither the note nor the court's reply were given to the clerk or otherwise made a matter of record (R. 70, 84-85). The jury continued to deliberate until about 11:00 p.m. on Thursday.

As the jury was preparing to return to its hotel on that Thursday night, one of the jurors became ill (R. 42). The next morning the doctor who was called to care for the sick juror reported that she could not resume deliberations for four or five hours. At a conference with the trial judge, petitioner's attorney moved for a mistrial on the ground that the illness of the juror might result "in some sort of a compromise verdict" (R. 40-41). The motion was denied, and jury deliberations were suspended until the following day. The jury resumed deliberations at 2:50 p.m. Saturday (R. 86). In a conference in chambers at which both attorneys, and the petitioner, were present, petitioner's attorney again moved for a mistrial, on the basis of information received shortly before from the doctor that the sick juror was suffering from nervous prostration and acute mental depression, and was in the need of psychiatric care (R. 53). At about 3:15 p.m., while this conference

was in progress, the bailiff brought a note to the judge, and the following colloquy ensued (R. 60-61):

The Court: This is a statement addressed to me: "I am sorry to inform you that the jury has not been able to reach a verdict. We are deadlocked without any hope, we believe, of any change and I feel it useless to deliberate any further. I am not familiar with procedure, but since the majority of the jurors feel that a meeting of the foreman with you might be helpful, I am making such a request."

We can't have a meeting with the foreman, but if they want a meeting, they could all come into court, but I don't know what would be accomplished by that. So, I think we will just tell them we got their message and tell them to keep on working.

Are there any further suggestions from anyone?

Mr. McLaughlin: Well, we have already moved for a mistrial.

The Court: Tell them I have got their message and I suggest they keep on working.

The Bailiff: All right.

At 8:20 p.m. on that Saturday the jury returned the verdict in the case (R. 62). The communication between court and jury was assigned as a ground for a new trial in a motion filed on Tuesday, March 10th (R. 78-84). The motion for a new trial was denied (R. 87). Appeal was taken and the conviction was affirmed by the court of appeals (R. 129).

SUMMARY OF ARGUMENT

I.

Payment of the excise tax on wagers requires the taxpayer to state in writing the gross amount of wagers accepted by him in the preceding month. Such a statement would tend to incriminate him with regard to a variety of state and federal crimes. The case is not controlled by *United States v. Kahriger,* 345 U.S. 22 (1953), and *Lewis v. United States,* 348 U.S. 419 (1955), for the occupational tax on wagering involved in those cases was considered to be prospective only, and thus beyond the reach of the privilege against self-incrimination, while the excise tax on wagers looks only to the past. The incrimination involved in the excise tax is compulsory, not voluntary, since while a person may have a free choice whether to become a gambler, he has no choice whether to pay the tax on wagers he has received. It is not possible to pay the tax without filing the return on which the incriminating information must be given, and even if it were, the mere act of payment of the tax would be communicative and incriminating. For reasons stated in *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965), where the requirement of a return, as here, is in an area permeated with criminal statutes, the constitutional privilege need not be claimed on the return and may be set up as a defense in a prosecution such as this one. Excise tax returns are made available to law enforcement officials, and are used to convict taxpayers of other offenses. The Fifth Amendment bars the government from compelling incriminating information, even where some valid governmental interest is served by obtaining the information.

II.

If, as argued under Point I, payment of the excise tax would require petitioner to incriminate himself, his conviction on the counts involving the excise tax should be reversed. Even if adequate protection against self-incrimination could be provided by a rule prohibiting use of information acquired in connection with collection of the tax, and the fruits of such information, in other prosecutions, such a grant of immunity is appropriately made by the legislative branch, and it would be particularly inappropriate for this Court to create such an immunity here where Congress has expressly provided that there shall be no immunity: 26 U.S.C. § 4422. In any event, such an immunity could be prospective only, and petitioner, who failed to pay the tax at a time when there was no reason to think that information given would not be used against him, should not now be punished for that failure.

III.

The communications between the jury and the court while the jury was deliberating denied petitioner his right to be present at every stage of the proceedings against him. Such communications outside the presence of a defendant require reversal unless it affirmatively appears in the record that there was no reasonable possibility of prejudice to the defendant. In this case the record does not show the exact contents of the note from the jury to the court, and it is silent as to what the bailiff said to the jury in response. It is quite possible that either or both of these communications may have been prejudicial to petitioner, and a new trial is required on this ground.

ARGUMENT

I. Payment of the Excise Tax on Wagers Requires the Taxpayer to Incriminate Himself, Contrary to His Constitutional Privilege.

If petitioner had been called before a federal or state grand jury, or other investigating body, put under oath, and asked to state the gross amount of wagers accepted by him in the preceding month, there would seem not the slightest doubt that he could properly refuse to answer on the ground that his answer might tend to incriminate him. An admission by petitioner that he had received wagers, in any stated amount, would be "a link in the chain of evidence," *Hoffman v. United States,* 341 U.S. 479, 486 (1951), by which he might be convicted of a number of state and federal crimes. Pennsylvania has statutes against lotteries and gambling, 18 Pa. Stat. §§ 4601, 4603. Federal statutes prohibit accepting wagers without having first paid the occupational tax, imposed by 26 U.S.C. § 4411, and registering, as required by 26 U.S.C. § 4412. The admission would virtually convict petitioner of having violated these statutes, and it might well also incriminate him under the racketeering statute, 18 U.S.C. § 1952. Cf. *United States v. Zizzo,* 338 F.2d 577 (7th Cir. 1964). Other federal crimes of which he might be found guilty, in part on the basis of such an admission, are 18 U.S.C. §§ 1084 (transmission of wagering information), 1301-1305 (lotteries), and 1953 (interstate transportation of wagering paraphernalia). Of course other proof would be required, in addition to petitioner's admission, to convict him of most or all of these crimes, but a brick is not a wall. An admission of having accepted wagers is

a more substantial link in the chain of proof needed to convict for various crimes than were the questions involved in *Hoffman v. United States*, 341 U.S. 479 (1951), or *Malloy v. Hogan*, 378 U.S. 1 (1964).

We do not anticipate that the United States will take issue with the conclusion stated in the previous paragraph. Yet the question hypothetically put to petitioner discussed there is precisely the question which Form 730 would have required him to answer, under penalties of perjury, had he sought to pay the excise tax on wagers imposed by 26 U.S.C. § 4401, and for nonpayment of which he now stands convicted. It is petitioner's position that he is protected as fully by the privilege against self-incrimination when the government seeks the information in connection with collection of a tax as if the government were to seek the information by asking him the question before a grand jury. "It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers." *Schmerber v. California*, 384 U.S. 757, 763-764 (1966). As the Court said only last term in a case with great relevance here, "if the admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes." *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 78 (1965).

On the analysis thus far, the conclusion would seem clear that petitioner cannot be punished for failure to pay the excise tax on wagers, or for conspiracy to avoid such payment, since to pay the tax would have forced

petitioner to be a witness against himself in a criminal proceeding, contrary to the Fifth Amendment. Against this conclusion, various arguments have been put forward by the court below or elsewhere, which we shall now consider. These arguments are: (1) this Court has already held that the wagering tax laws do not violate the privilege against self-incrimination; (2) petitioner is not compelled to incriminate himself because his decision to engage in gambling is wholly voluntary; (3) he was convicted for failure to pay the tax, not for failure to make the required return; (4) if the return calls for incriminating information, petitioner should have claimed his privilege on the return; (5) the returns are not incriminating since they are confidential; and (6) there is a valid governmental interest in collecting the tax which justifies the compulsion of incriminating information.

1. In *United States v. Kahriger*, 345 U.S. 22 (1953), and *Lewis v. United States*, 348 U.S. 419 (1955), this Court upheld, against Fifth Amendment objections, the occupational tax on wagering and the registration provision which accompanies it. 26 U.S.C. §§ 4411, 4412. If it were necessary to this case, we would be prepared to argue that *Kahriger* and *Lewis* should be overruled. The basic premise of those decisions, stated in *Kahriger*, 345 U.S. at 32, and relied on in *Lewis*, 348 U.S. at 422, is that "the privilege has relation only to past acts, not to future acts that may or may not be committed." The only authority cited by the Court for that proposition was 8 Wigmore, Evidence § 2259(c) (3d ed. 1940).

It implies no lack of appreciation of Dean Wigmore's great scholarly work to note that he was not a friend

of the privilege against self-incrimination, and that his views as to the proper breadth of the privilege must be discounted accordingly. To Wigmore the privilege "should be kept within limits the strictest possible." 8 Wigmore, Evidence § 2251, p. 318 (3d ed. 1940). But this Court has been true historically to a different canon of construction. To this Court the privilege "registers an important advance in the development of our liberty — 'one of the great landmarks in man's struggle to make himself civilized'." *Ullmann v. United States,* 350 U.S. 422, 426 (1956). The privilege therefore "must be accorded liberal construction in favor of the right it was intended to secure." *Hoffman v. United States,* 341 U.S. 479, 486 (1951).

The argument against the Court's reliance on Wigmore in *Kahriger* is more than merely *ad hominem.* Two years before the wagering taxes were enacted Professor Edmund M. Morgan made a detailed analysis of the proposition of Wigmore as to scope of the privilege on which the Court relied. Morgan concluded that only a strained and artificial understanding of a key term in Wigmore's text would "save the generalization from utter absurdity." Morgan, *The Privilege against Self-Incrimination,* 34 Minn.L.Rev. 1, 37 (1949). Without such an artificial understanding, he warned prophetically, "Wigmore's generalization would permit the destruction of the privilege in all or almost all situations by ingeniously drawn legislation." *Ibid.* The act imposing the wagering taxes, "a squeezing device contrived to put a man in federal prison if he refuses to confess himself into a state prison as a violator of state gambling laws," *United States v. Kahriger,* 345 U.S. 22, 36-37 (1953) (dissenting opinion), is just such "ingeniously

drawn legislation." Later writers have agreed with Morgan, rather than Wigmore or with this Court. So much of *Kahriger* as held the taxes involved valid as against Tenth Amendment objections has been favorably received, but the resolution of the Fifth Amendment issue in *Kahriger* and *Lewis* has produced a storm of criticism from the commentators. See Note, *Required Information and the Privilege Against Self-Incrimination,* 65 Col.L.Rev. 681, 687-690 (1965); Note, *The Fifth Amendment and the Federal Gambling Tax,* 5 Duke L.J. 86 (1956); and Rec.Dec., 29 N.Y.U.L.Rev. 217 (1954), 43 Geo. L.J. 676, (1955) 41 Va.L.Rev. 103 (1955).

We welcome the fact that the Court has agreed to consider whether *Kahriger* and *Lewis* should be overruled. *Costello v. United States,* No. 41, O. T. 1966. We consider that those decisions rest on a faulty premise which could lead to a substantial erosion of the constitutional privilege. But we need not pursue the point further, for it is clear that *Kahriger* and *Lewis* do not control this case, and that reversal should be had here whatever is decided in *Costello*. *Kahriger* and *Lewis* and *Costello* all involve the occupational tax on wagering, 26 U.S.C. §§ 4411, 4412. This case involves the excise tax on wagers, 26 U.S.C. § 4401. The Court held as it did in the two earlier cases by reading the occupational tax provisions as "wholly prospective," 348 U.S. at 422, and as relating only to acts to be performed "in the future". 345 U.S. at 33. No such reading is possible with regard to the excise tax. The excise tax is payable only on wagers which have, in the month covered by the return, actually been placed with the taxpayer. 26 U.S.C. § 4401(c); Treas. Reg. § 44.6011(a)-1(a). Lower courts have perceived clearly that the *Kahriger-Lewis* rationale has

no application where past acts are involved. The distinction was vividly presented in *United States v. Ansani,* 138 F.Supp. 451 (N.D. Ill. 1955), where the court, relying on *Kahriger,* upheld a count in an indictment charging a person with failure to register as a dealer in gambling devices, as required by 15 U.S.C. § 1173, but dismissed a count charging failure to file monthly records of sales and deliveries of such devices, as required by another portion of the cited statute, on the ground that that requirement of the statute would violate the privilege against self-incrimination. The distinction is also clearly drawn in such cases as *Russell v. United States,* 306 F.2d 402, 410 (9th Cir. 1962), and *Dugan v. United States,* 341 F.2d 85 (7th Cir. 1965).

A decision of particular interest is *Boynton v. State* 75 So.2d 211 (Fla.1954), where it was held that since payment of the excise tax is compelled by federal government, evidence of such payment must be excluded by the state privilege against self-incrimination. The court had no difficulty in distinguishing *Kahriger,* at 215: "The excise tax exacted becomes due after the purchaser has engaged in gambling. He is compelled to pay it; if he is then forced to admit it, he has no protection against self-incrimination."

2. The court below relied heavily, 358 F.2d at 164, on language in *Lewis,* 348 U.S. at 422-423, that the decision to engage in an unlawful business is a voluntary decision, and that therefore no one is compelled by the wagering tax laws to incriminate himself. To this there are three answers. First, as noted above, *Lewis* was concerned with the occupational tax, which was construed as prospective only. One who is considering entering

into the gambling business in the future may be thought to have free choice in the matter and thus free choice as to whether to pay the occupational tax. But there is no choice for the person who has accepted wagers in the past. He is compelled to pay the tax, and thus to incriminate himself, or he will be subjected, as petitioner has found, to severe penalties. Second, the language in *Lewis* about the voluntary nature of the incrimination required is quite inconsistent with the recent holding in *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965). Membership in the Communist Party is voluntary. Yet the fact that Albertson could have chosen not to join the party, or could have withdrawn after he had once joined, did not prevent this Court from holding that the requirement that he register was a compulsion which violated the privilege against self-incrimination. Third, the "voluntariness" argument, if taken seriously, would destroy the privilege. If gamblers are to be said to have notice of the wagering tax laws, and to have waived any protection under the Fifth Amendment when they voluntarily enter into their illegal business, the same thing would have to be said for bank robbers, white slavers, and those who are thought to have violated any of the numerous provisions of Title 18. These people have a free choice whether to commit a crime. They know before committing it that there are laws on the books by which they may be subpoenaed and required to testify, on pain of contempt. Yet the "voluntary" nature of their choice to become a criminal has never been thought to defeat their privilege against being compelled to testify as to their crimes.

3. The United States has suggested that any possible incrimination of petitioner must be in the filing of

the return, not the payment of the tax, and points out correctly that the indictment against petitioner charges him with failure to pay the tax, rather than relying on the following clause of 26 U.S.C. § 7203 which makes it equally a misdemeanor wilfully to fail to make a return. If there is merit to this distinction, then this Court unnecessarily decided a serious constitutional issue in the *Lewis* case, for there the information contained only one count, in which Lewis was charged with failure to pay the occupational tax imposed by what is now § 4411. He was not charged with failure to register under what is now § 4412. Transcript of Record, *Lewis v. United States*, No. 203 O. T. 1954, p. 1. In the pending *Costello* case, defendant has been sentenced to prison on counts of conspiracy and of failure to pay the occupational tax, and received a suspended sentence and probation on the count charging failure to register. *United States v. Costello*, 352 F.2d 848, 849-850 (2d Cir. 1965). If the distinction now proposed is sound, this Court would have to affirm Costello's prison sentence and could at best reverse the suspended sentence and probation on the registration count.

The suggested distinction presupposes that it is possible to pay the tax without making the return and thus without giving the incriminating information called for by Form 730. Form 730 is reproduced in the Appendix at p. 43. Such law as there is reinforces the teaching of common sense that this is not possible, and that the Internal Revenue Service would not accept payment without the return. There are at least three reported cases in which it appears that the Service would not accept a tendered payment of the occupational tax when the taxpayer refused to make all the disclosures de-

manded by Form 11-C, the form used in connection with that tax. *United States v. Whiting,* 311 F.2d 191, 193 (4th Cir. 1962); *United States v. Mungiole,* 233 F.2d 204 (3d Cir. 1956); *Combs v. Snyder,* 101 F. Supp. 531 (D.D.C. 1951), affirmed 342 U.S. 939 (1952). There is no reason to suppose that the Service would behave differently if tender of the excise tax, unaccompanied by a return, were made, for in refusing to accept the tax without a return the Service was acting in compliance with applicable statutes and regulations. Thus it is provided that "every person liable for any tax * * * shall * * * make such returns, and comply with such rules and regulations as the Secretary or his delegate may from time to time prescribe. * * *" 26 U.S.C. § 6001. Another statute provides that when required by regulations, any person liable for a tax "shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate. Every person required to make a return or statement shall include therein the information required by such forms or regulations." 26 U.S.C. § 6011(a). The full text of Treas. Reg. § 44.6011 (a)-1 is set out in the Appendix, p. 42 below. It provides in part that "every person required to pay the tax on wagers imposed by section 4401 of the Code shall make for each month, from the daily records required by §§ 44.4403-1 and 44.6001-1, a return on Form 730 in accordance with the instructions and regulations applicable thereto. * * *" It seems apparent that here, as in *Albertson v. Subversive Activities Control Board,* 382 U.S. 70, 78 (1965), "nothing in the Act or regulations permits less than literal and full compliance with the requirements of the form * * *."

Even on the quite unrealistic supposition that the Service would accept payment of the excise tax without requiring a Form 730, such a payment would be of a "communicative nature," *Schmerber v. California,* 384 U.S. 757, 761 (1966), and would be incriminating. To tender such a payment it would be necessary for the taxpayer in some way to identify the tender as being the sum due under § 4401. Such an identification would not be under oath, and is possibly less forceful than an express statement, required by Form 730, of "gross amount of wagers accepted during month." Nevertheless it would be admissible in evidence against the taxpayer, either as a "verbal act," McCormick, Evidence 463-464 (1954), or as an admission of a party opponent, *id.* at §§ 239 *et seq.* A jury could permissibly infer that no one pays the excise tax on wagers unless he has accepted wagers, and that inference would be a useful link in convicting the taxpayer of various crimes.

4. The court below relied, 358 F.2d at 164, on *United States v. Sullivan,* 274 U.S. 259, 263 (1927), for the proposition that if payment of the tax would have incriminated petitioner, he should have claimed his privilege on the return. But *Sullivan* is not apposite, for reasons which have been well stated by this Court and others. *Sullivan* involved the income tax, and the income tax return permits reporting of income without specific identification of source. Petitioner could make no return under § 4401 without admitting an actual or presumptive violation of law. Cf. *Russell v. United States,* 306 F.2d 402, 409 (9th Cir. 1962).

The limits on *Sullivan* were suggested when registration under the Subversive Activities Control Act first came before this Court:

"Tax returns must be filed generally, and answers to tax return questions may involve any of a wide variety of activities, whereas the obligation to file a registration statement compels a few particular individuals to come forward, to identify themselves, and to suggest, at least, their connection with a relatively limited potential sphere of criminal conduct. Then, too, in Sullivan, Mr. Justice Holmes assumed that some, at least, of the answers to the questions on the tax return would not have been incriminating, whereas in the case of the registration statement, any claim of the privilege would involve the withholding of all information; thus, there is, presumably, a greater governmental interest in having the privilege claimed specifically on the form in the tax-return circumstances."

Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1, 108-109 (1961). See also the observations on the same subject by Mr. Justice Brennan and the Chief Justice, dissenting in part, *id.* at 196.

What was said on this point in the *Communist Party* case was clearly dicta, since a majority of the Court found that the self-incrimination issue as to the registration provision was prematurely raised, and thus it was not necessary to decide whether *Sullivan* was controlling. The issue was properly raised, and had to be decided, in *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965). There the views suggested by way of dictum and dissent in *Communist Party* were accepted as the law by a unanimous Court. The Court said, at 79:

"In Sullivan the questions in the income tax return

> were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime."

Gamblers, like Communists, are "a highly selective group inherently suspect of criminal activities." The wagering taxes do not reach "an essentially noncriminal and regulatory area of inquiry," as does the income tax, but involve an area "permeated with criminal statutes." It is true that there are overtones of the right of free association involved in the *Albertson* case, but the right of privacy safeguarded by the Fifth Amendment is no less important a constitutional provision than is the First Amendment. It is entirely appropriate that a witness in a judicial, legislative, or administrative proceeding be required to claim his privilege if he wishes to enjoy its benefits — although for reasons of policy this logic is not extended to criminal defendants. The witness in a proceeding is present because there is already reason to believe that he has information on the subject matter of the inquiry. His invocation of the privilege may confirm the suspicions of his interrogators, but it is less likely to arouse such suspicions for the first time than would a rule which requires all persons everywhere, known or unknown, who fall within a prescribed category, to come forward and identify themselves by invocation of the privilege.

5. There can be no doubt that information as to payment of the occupational taxes on wagering is made available to other law enforcement agencies. 26 U.S.C. § 6107 so provides in terms. Even if *Deitch v. City of Chattanooga,* 195 Tenn. 245, 258 S.W.2d 776 (1953), upholding a city ordinance making it a misdemeanor to possess a federal wagering tax stamp, is regarded, as it should be, as a sport, the fact remains that in a number of cases evidence that a defendant had paid the occupational tax was introduced in evidence against him for various purposes. *Irvine v. California,* 347 U.S. 128, 130 (1954); *United States v. Zizzo,* 338 F.2d 577, 580-581 (7th Cir. 1964); *Commonwealth v. Fiorine,* 202 Pa. Super 88, 195 A.2d 119 (1963); *State v. Mills,* 229 La. 758, 86 So.2d 895 (1956); *Acklen v. State,* 196 Tenn. 314, 267 S.W.2d 101 (1954); *State v. Curry,* 92 Ohio App. 1, 109 N.E.2d 298 (1952).

Both in the trial court and in the court below the United States took the position that the excise tax and the occupational tax are treated differently in this respect, and that excise tax returns, and the names of those who have paid such taxes, are kept confidential. We doubt whether such a difference, if it exists, is of legal significance. Presumably the protection of the Fifth Amendment extends to *in camera* proceedings as fully as to public inquiries. But for the sake of completeness, we note here our view that no such difference does in fact exist.

At the outset, we concede that 26 U.S.C. § 6107, which gives state prosecutors access to lists of those who have paid special taxes, applies to the occupational tax but not to the excise tax, since by definition, 26

U.S.C. § 4901(c), a "special tax" is one the payment of which is evidenced by a stamp. So far as we can find, no statute or regulation reaches the question of whether wagering tax returns are confidential or for public use. We note also that a government witness testified at the trial that no record is available to the general public of those who have paid the excise tax (R. 101-102). The confidential nature of such returns was made less clear by the willingness of the United States Attorney at the trial to make available to defense counsel for examination the excise tax returns for all persons in the district who had paid such taxes during a period of three years. (Tr. 1556-1558) And it is interesting to observe that Mortimer M. Caplin, writing at a time when he was Commissioner of Internal Revenue, stated that "the Internal Revenue Service makes available to [local] agencies the names and addresses of those who have paid wagering taxes." Caplin, *The Gambling Business and Federal Taxes,* 8 Crime and Delinquency 371, 372 (1962). Commissioner Caplin further said that the District Directors were required by law to maintain for public inspection a list of all persons "who have paid certain 'special taxes.' This includes both the excise and the occupational taxes on wagering." *Id.* at 375. Perhaps Commissioner Caplin had forgotten 26 U.S.C. § 4901(c), and was mistaken in his belief that the excise tax is a "special tax" within 26 U.S.C. § 6107.

But this point is not one which needs to be resolved by speculation, for there is incontrovertible evidence, of which this Court may properly take judicial notice, that excise tax payments have not been kept confidential. In *State v. Mills,* 229 La. 758, 86 So.2d 895 (1956), forms

which plainly were copies of Form 730 were introduced in evidence against the defendant. That they were Form 730 is evident from the description by the Louisiana court that "the returns show that Mills was engaged in the business of accepting wagers on his own account, and show the amount of wagers accepted during each month of the period covered and the amount of tax due to the federal government." 229 La. at 771, 86 So.2d at 899-900. The copies offered "were certified by the custodian of the originals, an officer of the United States Treasury." 229 La. at 782, 86 So.2d at 903. The defendant had objected to admission of these documents on the ground that they were confidential and privileged, and this objection was expressly rejected by the state Supreme Court. 229 La. at 779, 86 So.2d at 902. In *Boynton v. State,* 75 So.2d 211 (Fla. 1954), the state offered evidence that defendants had paid the $50 occupational tax, that they had registered, and, at 213, that they had "paid ten percent of their gross gambling income to the Federal Government." The exact form this proof took was not stated by the court, but it is apparent, from the careful distinction drawn by the court between the occupational tax and the excise tax with regard to self-incrimination, *id.* at 215, that the proof was of payment of the excise tax. One of the issues in *United States v. Whiting,* 311 F.2d 191 (4th Cir. 1962), was whether a sufficient showing of probable cause had been made to justify the issuance of a search warrant. The warrant was held to have been properly issued on the basis of an affidavit from agents of the Intelligence Division of the Internal Revenue Service. A part of the information these agents had, and set forth in the affidavit, was that "in November 1951 Whiting had paid a 10% excise tax

on wagers accepted by him in that month, in conformity with 26 U.S.C. § 4401 * * *." *Id.* at 193.

Perhaps Commissioner Caplin misread the statute he cited, but he accurately described the practice. Information as to payment of the excise tax which is made available to state prosecutors, as in *Mills* and *Boynton,* and to agents of the Intelligence Division, as in *Whiting,* is not confidential and is used for incriminating purposes.

6. A final argument in defense of the wagering excise tax, and the accompanying requirement that taxpayers incriminate themselves, is that the tax is valid as a tax, that the requirement of a return serves the valid governmental interest of making possible the collection of the tax, and that this governmental interest outweighs any incidental incriminating effect.

We do not question the validity of the excise tax as a tax, even if the notion that Congress passed this measure in a bona fide attempt to raise revenue, and without thought to its usefulness as an incriminating device, does require us to shut our minds to what "all others can see and understand * * *." *Bailey v. Drexel Furniture Co.,* 259 U.S. 20, 37 (1922). But the Fifth Amendment does not say that no person "shall be compelled in any criminal case to be a witness against himself unless the government has a valid interest in obtaining the information sought." Nor has the amendment ever been given such a debilitating construction. The law has been that proper invocation of the Fifth Amendment "afford[s] a witness the right to resist inquiry in all circumstances." *Barenblatt v. United States,* 360 U.S. 109, 126 (1959). The interest of privacy recognized by the amendment may not

be set aside even if the government is seeking his testimony in the name of "self-preservation, 'the ultimate value of any society.' " Id. at 128. So long as the state may not compel persons to convict themselves out of their own mouths in order to put an end to serious crimes, or even to preserve government itself, it should not be able to do so to collect a tiny amount in taxes or to facilitate prosecution of gamblers.

To hold that a person may not be required to incriminate himself by payment of the excise tax would not have a destructive effect on the fisc. When Congress is seriously interested in obtaining incriminating information in order to serve some other national purpose, it knows how to give immunity to those who produce the information, *e.g.*, 18 U.S.C. §§ 1406, 2424(b), 3486, and its power to provide such immunity has been repeatedly upheld. *Brown v. Walker,* 161 U.S. 591 (1896); *Ullmann v. United States,* 350 U.S. 422 (1956). Congress chose not to give such immunity to persons paying wagering taxes, and indeed expressly denied any immunity. 26 U.S.C. § 4422. If the result, then, is that the constitutional privilege makes the tax unenforceable, the fault lies not with the Constitution but with the Congress.

* * * *

At the outset of this section the incriminating features of the excise tax on wagers, and of Form 730, were pointed out. The various arguments which have been advanced in support of the tax, against objections based on the Fifth Amendment, were then examined. We submit that these arguments are unsound, both on precedent and on principle, and that to compel payment of the excise tax on wagers requires the taxpayer to incriminate himself, contrary to his constitutional privilege.

II. The Fifth Amendment Objections to the Excise Tax Require Reversal of the Conviction.

In this section of the brief we assume that which was argued in the preceding section, i.e., that payment of the excise tax on wagers would require the taxpayer to incriminate himself. Such a conclusion would seem to require reversal of the conviction and dismissal of the indictment with regard to counts 1 to 4 and 6 to 17, the counts dealing with the excise tax on which petitioner was convicted.* These counts were attacked on constitutional grounds by motion to dismiss the indictment, and the constitutional objection was preserved at all appropriate times during and after trial.

It is necessary to argue this point, however, because in *Costello v. United States,* No. 41, O. T. 1966, which is to be heard immediately before this case, the United States advances the position that if the occupational tax on wagering involves a substantial risk of self-incrimination, the proper remedy is for this Court to bar use of information acquired in connection with collection of the occupational tax, and to affirm the conviction of petitioner in that case. Since the United States may take a similar position with regard to the excise tax here involved, we consider the question.

Immunity statutes are, of course, a commonplace. There are more than 40 immunity acts in the United States Code, dealing with a large part of the regulatory activities of the federal government. Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope,* 72 Yale L. J.

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*Petitioner was found not guilty on count 5.

1568, 1570 (1963). Similar state statutes have been widely adopted. 8 Wigmore, Evidence § 2281 n. 11 (McNaughton rev. 1961). Such grants of immunity are valid if they are "so broad as to have the same extent in scope and effect" as the constitutional privilege. *Counselman v. Hitchcock,* 142 U.S. 547, 585 (1892). Congress has power to grant immunity as to use of compelled incriminating testimony by the states, *Adams v. Maryland,* 347 U.S. 179, 183 (1954), and may even bar state prosecution. *Ullmann v. United States,* 350 U.S. 422, 435-436 (1956). Similarly this Court has ruled, either as a constitutional matter or in the exercise of its supervisory control over federal prosecutions, that the federal government cannot make any use of testimony compelled under a state immunity statute, or of the fruits of such testimony. *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52, 79 (1964).

The striking fact about all of the cases to date has been that it is the legislative branch of government which has determined to provide immunity. If the judicial branch has the power to create immunity without legislative action, then the wrong result was reached in a long line of famous cases, from *Counselman v. Hitchcock,* 142 U.S. 547 (1892), to *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965). Indeed if judicial power extends so far, the two cases just cited would have been especially appropriate cases in which to exercise it, for in each of those cases Congress had attempted to provide immunity, but had failed to make the immunity sufficiently broad to be coextensive with the privilege. It would have been far less heroic a step for this Court to broaden to the extent constitutionally re-

quired an immunity Congress had sought to confer than it would be to create out of whole cloth an immunity which Congress has expressly disclaimed. 26 U.S.C. § 4422. "Movant contends that neither Section 3290 [now § 4411] nor Section 3291 [now § 4412] contain any immunity to bar incriminating evidence furnished by a compliance therewith. That such omission was intended by Congress is made manifest by the provisions of Section 3297 [now § 4422] quoted above." *United States v. Forrester*, 105 F. Supp. 136, 137 (N.D. Ga. 1952). See also *Irvine v. California*, 347 U.S. 128, 130 (1954).

Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964), is not contrary to the conclusion here suggested. In *Murphy* the state had invoked a state immunity statute. This Court was required to decide there what effect that statute had on use of the testimony in a federal prosecution, in the light of the holding in that case discarding the "separate sovereignty" conception of the privilege. Here no legislature, federal or state, has granted any immunity.

The decision to grant immunity is not an easy or automatic one. Immunity statutes "can be justified only if the assistance that they provide government organs in obtaining information necessary to the performance of their functions outweighs the possible harm they do to the government—through unintended grants of immunity—and to individuals by subjecting them to social stigma, and perhaps, to painful, 'remedial,' sanctions." Comment, 72 Yale L. J. 1568, 1598 (1963). This kind of delicate balance is one appropriately struck by that branch of government in which the power to make laws is vested.

Argument.

Even if the Court were to think it proper to create a rule of immunity, forbidding use in federal and state prosecutions of excise tax returns and payments, or the fruits thereof, petitioner's conviction on the counts in question should be reversed. Petitioner did not pay the excise tax and, on the assumption on which this section of the brief is based, was correct in supposing that to pay the tax would force him to incriminate himself contrary to the Constitution. Here, unlike the situation in the companion *Costello* case, there were no decisions of this Court holding that he had no constitutional privilege to refuse to pay. He could have had no reason to anticipate that this Court would later hold that exicse tax returns could not be used against him in other prosecutions. Indeed the language of 26 U.S.C. § 4422 would have suggested precisely the opposite result. In *Raley v. Ohio,* 360 U.S. 423, 426 (1959), it was held that to convict a citizen for exercising a privilege which the state had clearly told him was available to him "would be to sanction an indefensible sort of entrapment by the State." It would be no more defensible to convict a citizen for exercising a privilege which was, by hypothesis, available to him save for a later creation of a an immunity which he could not possibly have anticipated. In *Bouie v. City of Columbia,* 378 U.S. 347, 352 (1964), it was held that "an unforeseeable and retroactive judicial expansion of narrow and precise statutory language" was a denial of due process of law. To hold that the constitutional privilege can be supplanted by an unforeseeable and retroactive judicial creation of an immunity in the face of narrow and precise statutory language denying immunity would raise similar questions of due process. If the Fifth Amendment objections to the ex-

cise tax are sound, as argued in the first section of this brief, the proper remedy is reversal of petitioner's conviction on those counts involving the excise tax.

III. The Conviction Should Be Reversed Because the Communications Between the Court and Jury in the Absence of Petitioner and His Counsel Have Not Been Shown Not to Be Prejudicial.

It is settled law that no communication may take place between the court and the jury in the absence of the defendant. This principle is now stated in Rule 43 of the Federal Rules of Criminal Procedure, but its origins are in the Sixth Amendment and it has long been recognized by this Court. In *Lewis v. United States,* 146 U.S. 370, 372 (1892), the Court declared: "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." At the same term, in *Mattox v. United States,* 146 U.S. 140, 150 (1892), the Court had said: "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden and invalidate the verdict, at least unless their harmlessness is made to appear." In the present case while the jury was deliberating the trial court received a communication from the jury, the exact contents of which are unknown, in the absence of both petitioner and his counsel. The bailiff, on instructions from the court, then gave the jury a message from the court, the contents of which are entirely unknown, in the absence of both petitioner and his counsel. This violation of petitioner's right to be present at every stage of the trial was plainly im-

proper under the principles announced in the *Lewis* and *Mattox* cases. The court below twice declared that this course of events in the trial court was "obvious error." 358 F.2d at 157, 158. Nevertheless it affirmed the conviction. In this, we submit, it erred.

The case in this Court closest in point is *Shields v. United States,* 273 U.S. 583 (1927). There counsel for the government and for the defendants had joined in a request to the court that the jury be held in deliberation until they should agree upon a verdict. Later in the deliberations the jury sent a note to the judge advising him of their verdict with regard to some defendants and of their inability to agree as to other defendants. The judge sent back a note telling the jury they would also have to find whether these other defendants were guilty or not guilty. These notes were received and sent in the absence of Shields and of his counsel, and they were not advised as to the notes, though the notes were preserved and made a matter of record. After the Third Circuit had affirmed Shields' conviction, Solicitor General William D. Mitchell advised this Court that "the government is unable to find any satisfactory ground for opposing the petition for a writ of certiorari," *id.* at 587, and a unanimous Court, speaking through Chief Justice Taft, reversed. Although the petitioner had assigned various grounds for reversal, among which were claims that the note sent to the jury was erroneous in substance, the Court found it unnecessary to consider such claims. It was enough for reversal, in the Court's view, that the trial court had communicated with the jurors in the absence of the defendant. The Court referred to *Fillippon v. Albion Vein Slate Co.,* 250 U.S. 76 (1919), in

which it had been held reversible error to send a supplemental written instruction to the jury in a civil case without notice to counsel and an opportunity to object, and said, at 588-589: "If this be true in a civil case, a fortiori is it true in a criminal case? The request made jointly by the counsel for the defendant and for the government to the court did not justify exception to the rule of orderly conduct of jury trial entitling the defendant, especially in a criminal case, to be present from the time the jury is impaneled until its discharge after rendering the verdict."

Reversal in this case would seem required by *Shields,* since in that case the contents of the communications were known, while here they are unknown. In only one respect is the *Shields* case distinguishable from this. In *Shields* defendant and his counsel did not learn of the communications until long after the verdict, while in the present case counsel for the defendant was advised by the government attorney of the fact of the communication some 45 minutes after it was made. The court below, apparently deeming this a significant distinction, rested its holding in part on the failure of counsel to object when he was informed of the communications. Neither the applicable rule, nor the cases, require an objection in the circumstances of this case. Criminal Rule 51, which ordinarily requires a party to make known his objection to the action of the court and the grounds therefor, contains the proviso: "but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him." By the time petitioner and his counsel learned of the communications between court and jury, whatever damage was

caused by them had been fully done. Of course objection is required in such a case as *United States v. Woodner*, 317 F.2d 649, 651 (2d Cir. 1963). There the judge held conferences with prospective jurors in the sight of defendant and his counsel but out of their hearing. Counsel knew what was occurring and could immediately have objected. Counsel in the present case, who did not know what was happening until after it was over, did not need to make an objection which would have served no useful purpose. As this Court said in the *Fillippon* case, the decision considered controlling in *Shields*: "It is not correct, however, to regard the opportunity of afterwards excepting to the instruction and to the manner of giving it as equivalent to an opportunity to be present during the proceedings." Similarly in *Brasfield v. United States*, 272 U.S. 448 (1926), a conviction was reversed because the judge inquired as to the numerical division of the jury, though no exception was taken to this action by the court. It was said in that case, at 450, that the power of the appellate court to correct an error though no exception was taken applies especially "where the error, as here, affects the proper relations of the court to the jury, and cannot be effectively remedied by modification of the judge's charge after the harm has been done." See also *United States v. Neal*, 320 F.2d 533 (3d Cir. 1963). There a conviction was reversed because the court responded to a note from the jury in the absence of defendant and counsel. Counsel were advised of this before the jury returned and made no objection. The case seems indistinguishable from the present case.

Although the decision below appears to rest in part on the absence of objection, the principal reason given by the Third Circuit for affirming in the face of what it

recognized to be "obvious error" is that such errors "do not warrant reversal in the absence of prejudice to the substantial rights of the appellant." 358 F.2d at 158. The court could find no prejudice since "the evidence as to the appellant's guilt was overwhelming and * * * therefore there was no reasonable likelihood that the judge's instruction to the jury influenced the verdict." *Ibid.*

It is not the law, however, that a defendant denied his right to be present at every stage of the proceeding against him must show that he has been prejudiced by this course of conduct. Some cases require no showing of prejudice whatever. This seems implicitly to be the teaching of *Shields,* because there the contents of the notes were known, the instruction conveyed by the note from the judge was assigned as error, but this Court expressly refused to pass on that ground, and, without any discussion of possible prejudice, reversed on the bare ground that the notes had been exchanged in the absence of the defendant. This is explicitly the teaching of *Arrington v. Robertson,* 114 F.2d 821, 823 (3d Cir. 1940), a civil case in which Judge Maris, writing for the Third Circuit, said that for the judge to send written instructions to the jury in the absence of defendant or his counsel "was the denial of a right so fundamental as necessarily to affect the substantial rights of the defendant regardless of the nature or propriety of the instruction given." In *Evans v. United States,* 284 F.2d 393 (6th Cir. 1960), supplemental instructions were given to the jury in open court with counsel present but the defendant inadvertently absent. The jury was immediately recalled to the courtroom and the supplemental instruc-

tions read by the reporter in the presence of the defendant. When this was concluded counsel for defendant three times said he was satisfied by this handling of the matter. Nevertheless it was held that reversal was required.

Though there is, as indicated, case support for the view that communications to the jury in the absence of the defendant require reversal regardless of the possibility of prejudice, we do not press for such a rule. We do not need to do so for reversal in this case, and we consider that such a rule would be unduly drastic. When all the circumstances as to the communications are known, and when it can be said "with certainty that no harm has been done," *Ferrari v. United States,* 244 F.2d 132, 145 (9th Cir. 1957), it would be insisting on form to reverse.

The rule which we think appropriate, and best supported in the cases, is that there must be reversal unless it affirmatively appears in the record that there was no reasonable possibility of prejudice to the defendant. This was the perception of this Court when it was first called upon to deal with such a problem. It said that private communications "invalidate the verdict, at least unless their harmlessness is made to appear." *Mattox v. United States,* 146 U.S. 140, 150 (1892). This is the construction which the Court has given the "harmless error" statute, 28 U.S.C. § 2111, in a variety of other contexts. It has held that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial. *McCandless v. United States,* 298 U.S. 342 (1936); *Bihn v. United States,* 328

U.S. 633, 638 (1946). This is the rule which has been adopted in terms in at least six circuits to deal with the specific problem of communications between court and jury outside the presence of the defendant. *Walker v. United States,* 322 F.2d 434, 436 (D.C.Cir. 1963); *United States v. Compagna,* 146 F.2d 524, 528 (2d Cir. 1944); *Estes v. United States,* 335 F.2d 609, 618 (5th Cir. 1964); *Rice v. United States,* 356 F.2d 709 (8th Cir. 1966); *Wheaton v. United States,* 133 F.2d 522, 527 (8th Cir. 1943); *Ray v. United States,* 114 F.2d 508, 513 (8th Cir. 1940); *Ah Fook Chang v. United States,* 91 F.2d 805, 810 (9th Cir. 1937); *Jones v. United States,* 299 F.2d 661, 662 (10th Cir. 1962); *Little v. United States,* 73 F.2d 861, 865-867 (10th Cir. 1934); *Fina v. United States,* 46 F.2d 643, 644 (10th Cir. 1931).

It may be that the Second Circuit has departed from this rule, which it followed in the *Compagna* case cited in the list above, for in *United States v. Woodner,* 317 F.2d 649, 652 (2d Cir. 1963), that court, while citing *Compagna,* appears to say that the defendant must make "some plain showing" of prejudice from the communications. If that is the holding of *Woodner,* it stands alone, save for the decision below in the present case. Such a rule would provide no protection to a defendant. To put the burden on defendant "to show something as prejudicial on which the record is silent, and defendant had no opportunity to hear, would be requiring of defendant the impossible. Such is not the law." *Fina v. United States,* 46 F.2d 643, 644 (10th Cir. 1931).

The court below found no reasonable likelihood that petitioner was harmed because it deemed the evidence of his guilt to be "overwhelming." Surely this is not the

kind of showing which the cases demand, for "it is not the appellate court's function to determine guilt or innocence." *Kotteakos v. United States,* 328 U.S. 750, 763 (1946). The evidence seemed less than overwhelming to the jury, which twice reported its inability to agree on a verdict. In a case in which the jury is divided it is especially important that no impropriety be tolerated which might have influenced the course of proceedings. On this record no one can say whether petitioner was prejudiced by the communications because no one knows what they were.

It was the recollection of the trial judge that the note which the jurors sent him stated that the jury could not agree, and that it was "to the same effect" and "at least in substance the same" (R. 70) as a later note from the jury which is a matter of record (R. 60). But this is not enough to show what was in the first note. Instead it shows only what the judge, five days later, said was in the note. It is not beyond the bounds of reasonable possibility that the first note may have indicated the numerical division of the jury. See, *e.g., Williams v. United States,* 338 F.2d 530 (D.C.Cir. 1964); *Mullin v. United States,* 356 F.2d 368 (D.C.Cir. 1966). If it did so, it is possible that the court should have immediately declared a mistrial, and in any event the court's action subsequently in keeping the jury together when a juror became ill, and was unable to participate in deliberations for a day and a half, would take on quite a different color.

The statements by the court with regard to the note at the hearing on the motion for a new trial suggest that the note was innocuous, and contained no information of the sort just described. But it implies no disrespect for

federal judges in general, or for the judge who presided at the trial of this case in particular, to note that human memory is a fallible thing. Elaborate rules in the law of evidence have been built on the proposition that "as respects oral testimony purporting to give from memory the terms of a writing, there is a special risk of error, greater than in the case of attempts at describing other situations generally." McCormick, Evidence 410 (1954). If a witness in a suit—even though he be a federal judge—were called to testify about an important writing, he would not be permitted to describe its contents without first accounting for the nonproduction of the original, and he then would be subject to searching cross-examination to test the accuracy of his recollection.

This illustrates the importance of the rule against communications between court and jury save in the presence of the defendant. When the rule is departed from, as here, either the subsequent statement of the judge as to what transpired must be accepted without question, which would be unrealistic, or the judge must be subjected to cross-examination and impeachment, which would be undesirable. Rigorous insistence on the rule against private communications protects the role of the judge as an impartial mediator whose word need never be questioned, and best maintains the confidence of the bar and the public in the federal judiciary.

We are able to see only as through a glass darkly what the jury said to the judge in its note. We lack even that knowledge of what the bailiff told the jury in response to the note. The only information in the record on this point is the affidavit of counsel for petitioner in which he recites that the United States Attorney informed him that the court had instructed the jury,

through the bailiff, to keep deliberating (R. 84). This is third-hand information as to what the judge said, and conveys nothing as to what the bailiff said. In *Ah Fook Chang v. United States,* 91 F.2d 805 (9th Cir. 1937), the foreman of the jury was given an oral answer, in the presence of counsel, to a question put by the jurors. This was held reversible error. "Further, we have the case where no one knows what the juror told the rest of the jury. If he repeated correctly the judge's instruction, the error would not be prejudicial. If he did not, the error may have been prejudicial. We must presume it prejudicial. * * * The jury received an instruction second hand, and not by the judge. Chances for error are too great." *Id.* at 810. The chances for error dictated reversal also in *Little v. United States,* 73 F.2d 861 (10th Cir. 1934). There the jury requested that instructions be reread, and the court, in the presence of counsel, sent the court reporter to the jury room to read them. "No harm may come from it, it is true; but on the other hand, a mistake in the reading of a shorthand symbol which defense counsel would instantly detect, an unconscious or deliberate emphasis or lack of it, an innocent attempt to explain the meaning of a word or a phrase, and many other events which might readily occur, would result in irremediable prejudice to the defendant." *Id.* at 864.

The instruction to keep deliberating is not a mere administrative detail, equivalent to telling the jury they may take a break for a meal. As a flood of recent cases in the courts of appeals indicate, one of the burning issues in criminal procedure today is what may properly be said to a deadlocked jury. For all the record shows, or any party to this litigation knows, the bailiff may have

given the jury his own version of the *Allen* charge. He may have told the jury, "You have got to reach a decision in this case." Cf. *Jenkins v. United States,* 380 U.S. 445 (1965). These are not imaginary horribles. See *Wheaton v. United States,* 133 F.2d 522 (8th Cir. 1943), where, in response to a note from the jury saying it was hopelessly deadlocked, the judge sent the bailiff back with the message he would not excuse them. The bailiff then stayed on in the jury room for some time explaining how they could vote separately on different counts.

Here, as in *Little v. United States,* 73 F.2d 861, 865 (10th Cir. 1934), "the record is silent as to what occurred in the jury room. There is nothing therefore in this record to support a finding, affirmatively made in the cited cases, that the error was necessarily harmless." The conviction should not stand in these circumstances.

CONCLUSION

The judgment below should be reversed, with instructions to dismiss the indictment as to counts 1 to 4 and 6 to 17, and with instructions for a new trial on counts 20 to 23.

Respectfully submitted,

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APPENDIX

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment V. No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

United States Constitution, Amendment VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Code, title 26, section 4401:

(a) Wagers. There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager. In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

United States Code, title 26, section 4422: The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes.

United States Code, title 26, section 6107: In the principal internal revenue office in each internal revenue district there shall be kept, for public inspection, an alphabetical list of the names of all persons who have paid special taxes under subtitle D or E within such district. Such list shall be prepared and kept pursuant to regulations prescribed by the Secretary or his delegate, and shall contain the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officers of any State, county, or municipality there shall be furnished to him a certified copy thereof, as of a public record, for which a fee of $1

for each 100 words or fraction thereof in the copy or copies so requested may be charged.

Treasury Regulations § 44.6011(a)-1(a): Every person required to pay the tax on wagers imposed by section 4401 of the Code shall make for each month, from the daily records required by §§ 44.4403-1 and 44.6001.1, a return on Form 730 in accordance with the instructions and regulations applicable thereto. A return shall be made for each month whether or not liability has been incurred for that month. If the taxpayer ceases operations which make him liable for the tax, the last return shall be marked "Final Return."

Federal Rules of Criminal Procedure, Rule 43: The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. * * *

Federal Rules of Criminal Procedure, Rule 51: Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

FORM 730 (Rev. Sept. 1960)
U. S. Treasury Department
Internal Revenue Service

TAX ON WAGERING

(Section 4401 of the Internal Revenue Code)

I declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signed) ..... (Date) .....

(Title) .....
(Owner, president, partner, member, etc.)

(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$.....
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$.....
3. Sum of items 1 and 2	$.....
4. Tax (10 percent of item 3)	$.....
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4(*a*) and (*b*))	$.....
6. Net tax due (item 4 less item 5)	$.....

MONTH		
	Penalty	$.....
	Interest	$.....
	Total due	$.....

ORIGINAL RETURN.—This form must be filed, with remittance, with the District Director of Internal Revenue. **IMPORTANT.**—Follow instructions carefully.